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IN THE
COURT OF APPEALS OF INDIANA

JASON TYE MYERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0606-CR-499
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT NO. 2
The Honorable Thomas H. Busch, Judge
Cause No. 79D02-0411-FA-25

May 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a bench trial, Appellant, Jason Tye Myers, was convicted of four counts of Dealing in Cocaine, all as Class A felonies.[1] Upon appeal, Myers presents two issues for our review, which we restate as: (1) whether the evidence was sufficient to rebut Myers's claim of entrapment; and (2) whether the trial court erred in imposing sentence.

We affirm.

The record reveals that on August 3, 2004, Patrick Dempster, a detective with the Lafayette Police Department assigned to the Tippecanoe County Drug Task Force, was contacted by a confidential informant ("C.I.") who informed him that defendant Myers was a cocaine dealer. Dempster went to the C.I.'s house to discuss the matter further and learned from the C.I. that Myers was interested in selling one ounce of cocaine for $1,200. The C.I. suggested that Dempster act as one of the C.I.'s family members. The C.I. then called Myers and told him that his cousin "Johnny," i.e. Dempster, wanted to buy cocaine but could purchase only one half of an ounce. Myers did not want to sell only a half ounce but agreed to meet with the C.I. and Dempster. Dempster, along with other members of the Task Force, prepared for a controlled buy.

Later that day, the C.I. contacted Dempster and told him that "company," meaning Myers, had arrived at his house. Dempster went to the C.I.'s house, where the C.I. told him to follow him to the back yard near the swimming pool. After briefly engaging in "small talk" with Dempster, Myers made a hand gesture indicating that he wanted money. Dempster gave Myers $600, to which Myers responded, "Where is the other $600.00 for the other half ounce?" Tr. at 17. Myers stated that he did not want to sell

[1] Ind. Code § 35-48-4-1(b) (Burns Code Ed. Supp. 2006).

less than the full ounce because he would have to "get scales and every f**king thing else . . . ." State's Exhibit 3A at p. 6. Myers also stated that he could sell the full ounce "right now," and that he had "somebody coming from Rensselear that wants it bad . . . he wanted it yesterday but he didn't come down so . . . I was getting ready to get more." Id. at p. 3. Dempster assured Myers that he could give him the balance of the cash the next day. Myers then made a phone call, after which he asked Dempster if he had anything to trade for the cocaine, but Dempster replied that he did not.

Myers then motioned for Dempster to follow him into the garage, where Myers proceeded to a file cabinet, opened the top drawer, and removed a bag containing what was later determined to be cocaine. Myers told Dempster that the cocaine was "quality." Id. at p. 4. Myers also told Dempster that he was "working [his] way up to a key"[2] and did not want to be "jack[ed] around" by Dempster. Id. at p. 7. Myers then agreed to sell the full ounce to Dempster but asked if he could have a "pinch" for himself and his brother. Tr. at 21. Dempster agreed, and he and Myers arranged to meet the following day so that Myers could receive the balance of the money owed him. The amount of cocaine Myers sold to Dempster that day was 29.9 grams.[3]

Myers and Dempster met again on August 10, 2004 in the parking lot of a restaurant. Myers approached Dempster's car, and Dempster handed him $400. Myers told Dempster that Dempster still owed him $200, saying that Dempster owed him for a cocaine debt that the C.I. owed Myers. The two then discussed pricing for future cocaine

[2] "Key" is slang for a kilogram.

[3] This is just slightly over one ounce, which is equivalent to 28.35 grams.

purchases. Myers told Dempster that he should deal directly with Myers, i.e. without the intervention of the C.I.

Myers telephoned Dempster on August 19, 2004, asking about the remaining money he thought he was owed. Myers also asked Dempster if he wanted any more cocaine. Dempster replied that he was interested, and Myers said that he would sell Dempster an "eight ball," i.e. one eighth of an ounce, for $150, but due to the debt of the C.I., Myers expected $350 in payment. Dempster told Myers that they could meet the following day. The next day, August 20, Dempster prepared another controlled buy and met with Myers in another restaurant parking lot. Myers entered Dempster's car and began to discuss selling cocaine, explaining that he usually sold quantities larger than one eighth of an ounce Dempster then took $350 and gave it to Myers, who then gave him a bag containing what was later determined to be 3.18 grams of cocaine.[4] Dempster told Myers that he would contact him the following week with the intention of buying even more cocaine.

On August 30, 2004, Myers telephoned Dempster and left several messages asking Dempster to call him back quickly. The two agreed to meet later that day and discussed the price and amount of cocaine to be sold that day. Ultimately, they agreed on $500 for a half ounce of cocaine, with the other half ounce to be sold later. Dempster again prepared a controlled buy and met with Myers at another restaurant parking lot. Myers appeared to be nervous and asked Dempster if he was with the Drug Task Force, to which Dempster falsely replied, "no." Tr. at 64. Apparently satisfied with this answer, Myers

[4] This is slightly under one eighth of an ounce, which is 3.54 grams.

took $500 from Dempster and in return gave him a bag containing what was later determined to be 14.01 grams of cocaine.[5] Myers asked Dempster about buying another half ounce, and Dempster asked if Myers would accept marijuana in trade. Myers declined, but agreed to meet Dempster the next day to sell another half ounce.

Although Myers had agreed to a price of $500 for a half ounce the day before, when Dempster called Myers on August 31, 2004, Myers said that he had to raise the price to $600, explaining that "he had charged even his best friend eleven hundred for the whole ounce." Tr. at 74. Dempster met with Myers later that day in a parking lot near a vacant building for another controlled buy. Myers walked up to Dempster's car and dropped a bag containing what was later determined to be 14.06 grams of cocaine inside the car while Dempster counted out the money to Myers. After Myers had taken the money, other police officers approached and arrested Myers.

On November 3, 2004, the State charged Myers as follows: Count I: dealing in cocaine as a Class A felony on August 3, 2004; Count II: possession of cocaine as a Class A felony on August 3, 2004; Count III: dealing in cocaine as a Class A felony on August 20, 2004; Count IV: possession of cocaine as a Class A felony on August 20, 2004; Count V: dealing in cocaine as a Class A felony on August 30, 2004; Count VI: possession of cocaine as a Class C felony on August 30, 2004; Count VII: dealing in cocaine as a Class A felony on August 31, 2004; Count VIII: possession of cocaine as a Class A felony on August 31, 2004; and Count IX: conspiracy to commit dealing in cocaine as a Class A felony. Myers waived his right to a jury trial, and on April 4, 2006,

[5] One half of an ounce contains 14.17 grams.

a bench trial was held. After the presentation of evidence, the State conceded that Count II could be no more than a Class C felony because, although the August 3 transaction occurred within 1,000 feet of a school, Myers had not suggested the location of the buy. However, the State argued that this did not affect Count I, which alleged both that the transaction occurred within 1,000 feet of a school and that the amount of cocaine involved was over three grams. After deliberation, the trial court entered an order finding Myers guilty on Counts I through VIII but not guilty on Count IX. The trial court declined to enter judgment upon Counts II, IV, VI, and VIII because of perceived double jeopardy concerns. Thus, Myers was convicted upon four counts of dealing in cocaine as a Class A felony.

A sentencing hearing was held on May 8, 2006. The court found as aggravating factors that, at the time the offenses were committed, Myers was on bond for two different charges and on probation and that Myers had a criminal history. The court found as a mitigating factor that the case involved a confidential informant and government agents. The court determined that the aggravating and mitigating factors were in balance. The court then sentenced Myers to thirty years incarceration upon each of the four convictions, with five years of each sentence suspended to probation. The court also ordered the sentences to run concurrently. Myers filed a notice of appeal on May 26, 2006.

Entrapment

Upon appeal, Myers contends that the evidence presented was insufficient to rebut his defense of entrapment. Indiana Code § 35-41-3-9 (Burns Code Ed. Repl. 1998) governs the defense of entrapment and provides:

> "(a) It is a defense that:
> (1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
> (2) the person was not predisposed to commit the offense.
>
> (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment."

The State may rebut the defense of entrapment either by (1) disproving police inducement or (2) by proving the defendant's predisposition to commit the crime. Riley v. State, 711 N.E.2d 489, 494 (Ind. 1999). If a defendant indicates that he intends to rely on the defense of entrapment and establishes police inducement, the burden shifts to the State to demonstrate that the defendant was predisposed to commit the crime. Espinoza v. State, 859 N.E.2d 375, 386 (Ind. Ct. App. 2006). Whether a defendant was predisposed to commit the crime charged is a question for the trier of fact which the State must prove beyond a reasonable doubt. Id. Upon appeal, we review such claims as we do other sufficiency matters: we neither reweigh the evidence nor judge the credibility of the witnesses, but instead we consider only the evidence that supports the verdict, and we draw all reasonable inferences from that evidence. Riley, 711 N.E.2d at 494.

Here, the evidence supporting the judgment would allow a reasonable trier of fact to conclude that the State successfully rebutted Myers's claim of entrapment; even if we

were to presume that there was police inducement, there was sufficient evidence to permit the trial court to conclude that Myers was predisposed to commit the crime. Myers indicated that, the day before the first controlled buy occurred, he was supposed to have sold the cocaine to another individual the day before. Myers was familiar with drug jargon and prices, even speaking of working up to selling a "key." Exhibit 3A at p. 7. When Dempster purchased an "eight ball," Myers stated that he usually sold in larger quantities. Also, the August 30 buy was initiated by Myers's messages to Dempster. When he met with Dempster the next day, Myers stated that he had sold an ounce of cocaine to his best friend for $1,100 the day before. This evidence is sufficient to establish a predisposition to deal in a controlled substance. See Riley, 711 N.E.2d at 494 (evidence that defendant was familiar with drug jargon and prices, that he engaged in multiple transactions, and that he personally undertook to arrange at least one future transaction was sufficient to establish a predisposition to deal in a controlled substance); Martin v. State, 537 N.E.2d 491, 495 (Ind. 1989) (familiarity with drug jargon and two sales to undercover officers sufficient to demonstrate predisposition to sell drugs). The evidence was therefore sufficient to rebut Myers's claimed defense of entrapment.

Sentencing

Myers argues that the trial court erred in imposing sentence, claiming that his sentence is inappropriate. In attacking the appropriateness of the trial court's sentence, Myers effectively claims that the trial court overlooked certain mitigating factors.[6] Thus,

[6] In response to Blakely v. Washington, 542 U.S. 296 (2004), Indiana's sentencing statutes were amended on April 25, 2005 to refer to an advisory instead of a presumptive sentence. Since Myers

we also review the trial court's finding of mitigating circumstances.[7] In doing so, we note that a trial court is not required to find mitigating circumstances, nor is it obligated to accept as mitigating each of the circumstances proffered by the defendant. Ousley v. State, 807 N.E.2d 758, 761 (Ind. Ct. App. 2004). Accordingly, the finding of a mitigating circumstance is within the trial court's discretion. Id. A trial court does not err in failing to find a mitigating factor when the presence of a mitigating factor is highly disputable in nature, weight, or significance. Id. at 761-62. Only when a significant mitigator is clearly supported by the record is there a reasonable belief that the mitigator was overlooked. Id. at 762.

Myers first claims that the trial court should have considered as mitigating the fact that he demonstrated remorse, specifically referring to a letter he wrote to the trial court expressing his regret for his actions. Upon appeal, we give substantial deference to the trial court's evaluation of remorse because the trial court has the ability to directly observe the defendant and is in the best position to determine whether the remorse is genuine. Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Here, although Myers claimed to be sorry for his crimes in the letter he wrote to the trial court, he also attempted to deflect blame for his actions by claiming that he was "not in the right state

committed the crimes in question in 2004, before the effective date of the amendments, we apply the versions of the statutes then in effect. See Cole v. State, 850 N.E.2d 417, 418 n.1 (Ind. Ct. App. 2006).

[7] Usually, when a trial court finds aggravating or mitigating circumstances, it must make a statement of its reasons for selecting the sentence imposed. Burgess v. State, 854 N.E.2d 35, 39 (Ind. Ct. App. 2006). However, if the trial court finds no aggravators or mitigators and imposes the presumptive sentence, the trial court does not need to set forth its reasons for imposing the presumptive sentence. Id. But if the trial court finds aggravators and mitigators, concludes they balance, and imposes the presumptive sentence, then it must provide a statement of its reasons for imposing the presumptive sentence. Id. Here, the trial court found aggravators and mitigators, concluded they balanced, and imposed the presumptive sentence.

of mind during the period of [his] crime[s]." App. at 25. Thus, we cannot say that the trial court was required to have accepted Myers's claim of remorse or consider such as a substantial mitigating factor.

Myers also claims that the trial court should have considered as mitigating that the "chain of events comprising this case was set in motion by an agent of law enforcement." Appellant's Br. at 9. However, the trial court did specifically find as a mitigating factor that this case involved a confidential informant and government agents. Thus, the trial court recognized that the State had some role in the crimes committed and gave this factor mitigating weight.

Myers also points to his difficult childhood as a factor which should have been considered as mitigating. Myers claims that he was reared by a mother who had a substance abuse problem and a stepfather who was abusive, manufactured methamphetamine, and was a member of the Hell's Angels motorcycle gang. Even accepting these facts as true, we cannot say that such facts have to be given mitigating weight because Myers does not explain why his troubled past led to his current behavior. See Hines v. State, 856 N.E.2d 1275, 1283 (Ind. Ct. App. 2006); see also Coleman v. State, 741 N.E.2d 697, 700 (Ind. 2000) (evidence of a "difficult childhood" warrants little if any mitigating weight), cert. denied, 534 U.S. 1057 (2001); Loveless v. State, 642 N.E.2d 974, 976-77 (Ind. 1994) (trial court was not obligated to consider as mitigating defendant's "overwhelmingly difficult" childhood where there was no indication of how the defendant's admittedly painful childhood was relevant to her level of culpability).

Myers also refers to his attempt to obtain his GED and that he was "actively engaged in Bible study" as additional mitigating circumstances. Appellant's Br. at 9. While we certainly applaud any attempt by Myers to improve himself, we cannot say that the trial court was under any obligation to consider such as mitigating factors warranting a reduced sentence. In short, we discern no error upon the part of the trial court in its identification of mitigating circumstances.

Myers also generally claims that his sentence was "inappropriate." Pursuant to Indiana Appellate Rule 7(B), this court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

We note that Myers has a lengthy criminal history, including convictions for six misdemeanors. We also note that nine times during his criminal history, the court had to issue warrants for Myers because of his failure to appear. Myers was also convicted in 2003 of Class C felony battery resulting in serious bodily injury and Class D felony criminal recklessness resulting in serious bodily injury. Myers posted bond in that case and was still out on bond when he committed the instant offenses. Myers was also charged in 2004 with dealing in and possession of marijuana and maintaining a common nuisance, all Class D felonies. Although these charges were dismissed on April 19, 2006, Myers was also out on bond in that case when he committed the instant offenses. Furthermore, Myers was given probation for one of his misdemeanor convictions (false informing), and a petition to revoke this probation was pending at the time of sentencing. This criminal history has now culminated in Myers being convicted of four Class A

felonies for dealing in cocaine in an amount substantially larger than the three grams required to elevate dealing to a Class A felony.

Despite this criminal history, the trial court, in light of the mitigating circumstances it perceived, sentenced Myers to the presumptive thirty years on each count and suspended five years of each sentence and further ordered that all of the sentences run concurrently. Thus, Myers was ordered to serve twenty-five years incarceration after being convicted of four Class A felonies. On the whole, given the nature of the offense and Myers's character, and giving due consideration to the trial court's sentencing decision, we cannot say that Myers's sentence is inappropriate.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.